WASHINGTON
LEGISLATIVE OFFICE

To: Interested Persons

From: Timothy H. Edgar, National Security Policy Counsel

Date: November 17, 2005 (revised)

Re: Draft conference report on H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005

The ACLU opposes the draft conference report ("conference report") because it makes virtually all of the expiring provisions of the USA PATRIOT Act (Patriot Act) permanent without including necessary changes to restore checks and balances. While the conference report contains some improvements to the Patriot Act that reflect the tireless work of members on both sides of the aisle, the final reauthorization bill remains substantially flawed and continues to infringe on our constitutional rights.

We appreciate the efforts of the many Senators and Representatives who worked to improve the legislation to add civil liberties safeguards. As we explain further below, a few of the many provisions in the conference report make some meaningful changes to the law to protect civil liberties, but many other changes either are not meaningful or take a big step backwards. Indeed, taken as a whole, the conference report's changes to the Patriot Act simply do not do enough to protect civil liberties to make the extension of these controversial powers consistent with fundamental American freedoms.

In summary, the conference report:

- **Permits the records of ordinary Americans to be secretly obtained without adequate safeguards (sections 106, 115).** While the conferees rejected a call for new FBI "administrative subpoenas" without any prior court review, records that are not connected to an international terrorist or spy could still be obtained using either a secret order under the Foreign Intelligence Surveillance Act (FISA) or a "national security letter" (NSL) that can be issued by an FBI official without any court oversight. For FISA orders (but not NSLs), the court would have to find that "reasonable grounds" existed to support the government's contention that the orders were relevant to an investigation to protect against terrorism and records that were connected to an international terrorist or spy would be presumed relevant – i.e., while it would be easier to obtain records that are connected to a suspected foreign terrorist or spy (because such records enjoy a presumption of relevance), it would be no

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

CAROLINE R. FREDRICKSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

harder to get records that do not contain any such connection and concern wholly innocent people. Limited judicial review would be available if a recipient objects. Secret court orders, but not NSLs, would include "minimization" procedures to limit the government's retention of information about people with no connected to a suspected spy or terrorist. While welcome, such minimization procedures are no substitute for a meaningful standard for the issuance of such orders that would require some connection between the records sought and a suspected terrorist, spy or other foreign agent, or for meaningful judicial review to determine whether that standard was met.

- **Continue to gag recipients of records demands without any prior court finding, with new criminal penalties (sections 106, 116, 117).** Both secret FISA orders and NSLs would continue to contain a potentially permanent gag provision that bars a recipient from telling anyone (other than the recipient's lawyer) that records have been obtained. For NSLs, there is an express right to challenge the gag in court, but the burden is on the recipient to do so and the court must accept as "conclusive" the government's assertion that disclosure of an NSL would harm national security. A new crime of knowingly violating the gag provision of an NSL is created, with penalties of up to one year in prison even if there is no intent to obstruct an investigation.

- **Allows sneak-and-peek searches under a broad standard; new time limits would still allow such searches to continue to remain secret for weeks, months or even years (section 114).** The bill would preserve the overbroad standard for sneak-and-peek searches that permits notice of the search of a home to be delayed whenever immediate notice might "seriously jeopardize" an ongoing investigation. Delays would no longer be allowed for any "reasonable time" but would be presumptively limited to an initial 30-day period, with an unlimited number of 90-day extensions if approved by the court. These modest limits could be waived by the court, which has broad discretion to set a longer initial period or a longer renewal period.

- **Allows secret eavesdropping and secret search orders that do not name a target or a location with enhanced court oversight (section 108)**. While the bill requires some additional court oversight of the government's use of this broad power, it would still permit the government to obtain what amounts to a blank or general warrant – an order that allows the government to eavesdrop on a telephone conversation or secretly search a home or business and, in effect, fill in the names and locations later.

- **Reforms the Patriot Act's definition of "domestic terrorism" to provide that assets may not be forfeited except where the organization or individual is involved in a serious federal crime (section 119).** While the current, overbroad definition of domestic terrorism remains in place – which covers any unlawful activity that is dangerous to human life and could cover the civil disobedience activities of some protest organizations – the civil forfeiture statute is amended to provide that a narrower list of federal crimes will be used for forfeiture purposes.

- **Omits modest limits on a host of additional Patriot Act surveillance powers.** Many Patriot Act surveillance powers are made permanent with no change, or even with expanded scope. For example, FISA surveillance of non-U.S. persons can continue for as

long as a year with no additional court review. Likewise, confidential information gathered in criminal investigations can continue to be shared with the CIA or foreign intelligence agencies without adequate privacy safeguards, or even notice to the court overseeing the criminal investigation.

- **Creates additional death penalties.** Although the final reauthorization bill includes the most extreme death penalty provisions sought by some, it would create a number of new crimes, including new death penalties, without adequate consideration by Congress.

- **Allows Justice Department, not federal courts, to determine that a state has a competent death penalty system.** If a state establishes an effective system for providing competent counsel to indigent defendants in death penalty proceedings it will qualify for a relaxed set of procedural rules for federal habeas proceedings that are beneficial to the state. Sec. 507 takes the decision of whether there is an adequate system out of the hands of the federal courts, and gives it to the U.S. Attorney General.

- **Provides a new, seven year sunset on only three provisions out of scores of new surveillance powers obtained by the government in the Patriot Act.** The bill provides an excessively long, seven-year sunset on only three specific provisions, despite broad bipartisan support in the House and Senate for a shorter, four-year sunset period.

Our detailed analysis follows.

Secret orders for records of libraries, bookstores, businesses, doctors' offices, financial institutions, communications providers. The conference report would continue to permit the records of ordinary Americans to be secretly obtained under sections 215 and 505 of the Patriot Act with only minimal additional safeguards.

The conferees wisely rejected a call for new FBI "administrative subpoenas" without any prior court review. Such a far-reaching proposal would have essentially eliminated even those inadequate safeguards that exist in the Patriot Act, such as the requirement that the secret Foreign Intelligence Surveillance Court (FISA court) provide prior approval for records obtained under section 215. Nevertheless, under the conference report, records that are not connected to an international terrorist or spy could still be obtained using either a secret FISA court order under section 215 of the Patriot Act or a "national security letter" (NSL) under section 505 of the Patriot Act. NSLs can be issued by an FBI official without any court approval.

Section 106 of the conference report amends section 215 of the Patriot Act. Under the amended FISA records power, the FISA court would have to find that "reasonable grounds" existed to support the government's contention that the orders were relevant to an investigation to protect against terrorism. Records that are connected to a suspected foreign terrorist or spy would be presumed relevant. In other words, while it would be easier to obtain records that are connected to a suspected foreign terrorist or spy (because such records enjoy a presumption of relevance), it would be no harder to get records that do not contain any such connection and concern wholly innocent people. In theory, limited judicial review would be available if a recipient objects, but only to determine whether the orders were unlawful. Disturbingly, the statute provides that any information obtained that is privileged – for example, attorney-client communications – would

not lose its privileged character, strongly implying that the existence of the legal privilege would not be a valid basis for challenging the order.

This right to challenge is clearly inadequate. National security investigations are broad ranging and can seek information about lawful activities, including political, religious or other First Amendment activities as long as the government maintains the inquiry is necessary to protect against international terrorism or espionage. In addition, review in the FISA court would be much more restricted than in ordinary proceedings, because such review would be conducted in secret, with classified information that the recipient would generally be barred from examining. The recipient's right to challenge would also be limited by the expense of litigating before a special court in Washington, DC. Furthermore, under proposed rules issued by the FISA court in October, a recipient's right to choose a lawyer (and the expense of litigation) would be further limited because only lawyers with security clearances could appear before the court.

Secret FISA court records orders would include "minimization" procedures to limit the government's retention of information that has no relation to foreign intelligence – a very broad category of information that is defined to include anything relevant to the activities of a foreign government or foreign person. This is a very poor substitute for appropriately limiting these orders to those connected to a suspected terrorist or spy. Such procedures would be drafted in secret by the government and the FISA court would have limited ability, as a practical matter, to enforce such limits. The FISA court has expressed frustration with the government's failure to honor minimization procedures in the past.[1]

The conference report provides (at section 115) a right to challenge NSL demands in a federal court, but does nothing to provide a meaningful standard for the issuance of an NSL. It fails to require a statement of facts or any individualized suspicion connecting the records sought to a suspected foreign terrorist. The provisions on NSLs also does not include the minimization requirements that are included in the bill for FISA court orders for records, instead mandating a study of the issue. A study is not needed. According to reports, NSLs are now issued at a rate of 30,000 per year, a 100-fold increase that dwarfs the number of FISA court orders,[2] but the conference report fails to provide any meaningful substantive limit on NSLs or provide any additional prior review. The conference report would also make explicit the government's power to seek a court order to require compliance with an NSL without giving the court discretion to decline to enforce or examine the underlying bases for the demand. Failure to comply could result in a finding of contempt, which could result in fines or even jail time.

Finally, the conference report also continues to allow the FBI to gag recipients of records demands without any prior court finding, even creating a new crime to penalize any violation of the gag order (at section 117). Both secret FISA orders and NSLs would continue to contain a potentially permanent gag provision that prevents a recipient from telling anyone that records have been obtained (sections 106, 116). For secret FISA court orders, there is no express right to challenge the gag provision, although it is possible the provision could be challenged under the general right to challenge the "legality" of the order, which must include the gag provision.

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[1] *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 624 (For. Intel. Surv. Ct. 2002), *opinion rev'd on other grounds, In re Sealed Case*, 310 F.3d 717 (For. Intel. Surv. Ct. Rev. 2002).
[2] Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Washington Post, Nov. 6, 2005, at A1

(section 106). For NSLs, there is an express right to challenge the gag provisions in court, but the court must accept as "conclusive" the government's assertion that disclosure of an NSL may harm national security or interfere in a criminal investigation (section 106). This assertion will no doubt be routine, thus rendering review virtually meaningless. These provisions infringe on the separation of powers, by purporting to instruct federal courts that they must accept as conclusive a certification provided by the Executive Branch regarding fundamental First Amendment rights. Any person that unsuccessfully challenged the gag would have to wait a full year for any further challenge, and then the government could simply make the same conclusive certification again. Unauthorized disclosures of NSLs would be criminal even if they were not made with intent to obstruct an investigation.

These provisions do not cure the constitutional problems of such a sweeping prior restraint on speech, instead they worsen the problem by making speech about the receipt of a government demand for private records a federal crime. Adding criminal penalties for unauthorized disclosure threatens to create unintended consequences, encouraging more criminal leak investigations that will result in prosecutors forcing journalists to disclose their confidential sources on threat of jail.

Secret searches of homes and businesses. Section 114 of the conference report would continue to allow sneak-and-peek searches under a broad standard that threatens the constitutional principle of "knock-and-announce" that is incorporated in long-standing Fourth Amendment precedent. While Patriot Act reformers had urged that such searches should only be allowed if the government could show that specific harms would result, the conference report would preserve the overbroad standard for sneak-and-peek searches allowing notice of the search of a home to be delayed whenever immediate notice might "seriously jeopardize" an ongoing investigation. The problem with such a standard is that courts will be reluctant to second-guess the government's contention about the effect of notice on its own investigation.

The conference report includes new time limits on delayed notice that are better than current law, but would still allow such searches to continue to remain secret for weeks, months or even years. As the Justice Department has reported, fully 88 percent of such searches occur in cases having nothing to do with terrorism.

Delays would no longer be allowed for any "reasonable time" but would be presumptively limited to an initial 30-day period, with an unlimited number of 90-day extensions if approved by the court. However, these limits could be waived by the court, which has broad discretion to set a longer initial period or a longer renewal period, both of unspecified duration, if the "facts of the case" justify a longer period.

Roving "John Doe" wiretap orders. Section 108 of the conference report would allow the FISA court to continue to issue secret eavesdropping and secret search orders that do not name a target or a location. These roving "John Doe" wiretaps could never be approved by an ordinary federal court, because the statute governing criminal electronic surveillance does not permit a surveillance order to be issued that fails to name either the target or the phone. Where "roving" surveillance is allowed that follows a target from phone to phone, criminal surveillance also requires the government to ascertain that the target is using the phone.

Section 108 does include enhanced court oversight of this broad power. The government would be required to report back to the court, ordinarily within 10 days (although this period could be extended for up to 60 days for good cause) about why the government believed the target of the surveillance would be at the location where conversations were intercepted. Unlike criminal wiretaps, law enforcement officials would not have to ascertain that the surveillance target was in the proximity of the telephone, computer or other device the communications of which would be intercepted. The conference report would still permit the government to obtain what amounts to a blank or general warrant – an order that allows the government to eavesdrop on a telephone conversation or secretly search a home or business and, in effect, fill in the names and locations later.

Definition of "domestic terrorism." Section 119 of the conference report reforms the Patriot Act's definition of "domestic terrorism" to provide that assets may not be forfeited except where the organization or individual is involved in a serious federal crime. This is a welcome, although limited, reform.

The bill would leave the current, overbroad definition of domestic terrorism in place. That definition, laid out at 18 U.S.C. § 2331, covers any unlawful activity that is dangerous to human life. Such a broad definition, which applies even to minor state crimes such as trespass or vandalism, could cover the civil disobedience activities of some protest organizations.

The Patriot Act provides a number of significant consequences for any group or individual that is engaged in either international or domestic terrorism as defined by 18 U.S.C. § 2331, including becoming the subject of broad surveillance and other law enforcement powers. Among the most far-reaching is civil forfeiture of the assets of an organization connected to domestic terrorism. Civil forfeiture is a process where the government may seize assets or personal property (such as a person's home, boat, or car). Forfeiture can take place even without any criminal conviction and forfeiture proceedings do not include all of the protections of a criminal trial.

Section 119 of the conference report would amend the civil forfeiture statute to provide that civil forfeiture would be triggered, not by the very broad definition of "domestic terrorism," but rather by a showing that an individual is implicated in one of a narrower (although still very extensive) list of "Federal crimes of terrorism" at 18 U.S.C. § 2332b(g)(5).

Other surveillance authorities. The conference report omits a number of proposed modest limits on a host of additional Patriot Act surveillance powers. Many Patriot Act surveillance powers are made permanent with no change, or even with expanded scope.

For example, section 105 of the conference report would allow FISA surveillance of non-U.S. persons to continue for as long as a year with no additional court review, going significantly beyond the expanded surveillance approved by section 207 of the Patriot Act. Likewise, confidential information gathered in criminal investigations can continue to be shared with the CIA or foreign intelligence agencies without adequate privacy safeguards, or even notice to the court overseeing the criminal investigation.

Notice of information sharing is already required under section 203(a) of the Patriot Act for grand jury information. Extending notice to information shared under sections 203(b) and (d) would allow the court to ensure that a criminal investigation is not being improperly conducted

as a pretext for an intelligence probe on behalf of the CIA or other intelligence agency without an adequate criminal foundation. This sensible, modest limit on surveillance was contained in the House-passed bill (H.R. 3199) and in the version of the Senate bill introduced by Senators Specter and Feinstein (S. 1389), but the conference report omits this safeguard.

Death penalty provisions. The conference report omits the most extreme death penalty changes that had been sought by some, but still creates a number of new crimes, including new death penalties, without adequate consideration. The death penalty system in the United States is deeply troubled, with over 100 people on death row having been found innocent.

Reauthorization of the Patriot Act is certainly not an appropriate vehicle for adding new death penalties to an already troubled death penalty system. Congress should consider such changes in separate legislation, where they can be given the attention they deserve.

Habeas corpus provisions. Section 507 of the conference report would take the authority to decide when a state has a competent system of legal representation in death penalty cases out of the hands of the Courts.

Presently, if a state establishes an effective system for providing competent counsel to indigent defendants in death penalty proceedings it will qualify for a relaxed set of procedural rules for federal habeas proceedings that are beneficial to the state. After enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts have been responsible for determining whether states are providing competent counsel in death row habeas cases. No state has qualified under the so-called "opt-in" (relaxed) provision of AEDPA. Federal courts make the determination as to whether a state has satisfied the requirements to opt-in.

Under Sec. 507, federal courts would no longer decide whether a state has established a competent counsel system for indigent persons in capital punishment proceedings. Instead, that decision would be made by the United States Attorney General. Giving the Attorney General, the chief prosecuting officer of the United States, the authority to effectively decide whether state indigent defense counsel systems pass thus hardly neutral with respect to criminal cases and making an important decision as whether defendants are receiving adequate representation.

Sunsets and oversight. The bill provides an excessively long, seven-year sunset on only three specific provisions, despite the unanimous support in the House and Senate for a four year sunset period.

Sixteen of the Patriot Act's provisions expanding secret surveillance will expire at the end of 2005 if not renewed by Congress. If the conference report is enacted, this "sunset clause" will be repealed and fourteen of these provisions become permanent. The other two provisions are extended for seven years, until December 31, 2012. These include the provisions relating to secret FISA court orders (section 215 of the Patriot Act) and roving wiretaps (section 206) of the Patriot Act

The conference report would also repeal one sunset in the Intelligence Reform and Terrorism Prevention Act of 2004, and extend another. That law's changes to the crime of providing material support to a terrorist organization will be made permanent. Section 6001 of the Intelligence Reform Act, which allowed the FISA court to issue wiretaps and secret search

orders for non-citizens who are not connected to any foreign terrorist organization would be extended to December 31, 2012, along with the two Patriot Act provisions.

A seven-year sunset would diminish Congress's leverage for obtaining information about the use of these powers for the rest of this administration and almost all of the next president's first term in office. Congress should not forgo the opportunity for meaningful review of these extraordinary powers for the rest of the decade.

Conclusion. The ACLU opposes the conference report. Despite yeoman's work on behalf of civil liberties by many members on both sides of the aisle, the conference report remains flawed. It does contain some improvements, but other changes either are not meaningful or represent a step backwards. While making virtually all of the expiring provisions of the USA PATRIOT Act (Patriot Act) permanent, it fails to include necessary changes to restore checks and balances. The improvements are simply not sufficient to make renewal of the Patriot Act consistent with the Bill of Rights.